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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ONE PARCEL OF LAND and MARVIN J. GOLDMAN and FRED BURKA, Individually and as Trustees, etc.,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, a body corporate,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court is not reported. It is reproduced as Appendix A, pp. 1a-39a *infra*. The order of the Court of Appeals for the Fourth Circuit is reported at 599 F.2d 1050. The opinion of that court is unreported. It is reproduced as Appendix B pp. 40a-41a *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1979. By orders of September 11 and October 24, 1979 Mr. Chief Justice Burger extended the time for filing this petition to November 10, 1979. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In an eminent domain proceeding is it beyond the judicial cognizance of the federal courts to consider the property owner's defense that the taking is not for the public use asserted by the condemning agency, but (a) to compel the owner to donate or convey for less than just compensation a smaller interest concededly needed, or (b) to enable the condemning agency to develop or reconvey the excess property for a profit, even though the authority to do so is not granted by statute?

CONSTITUTION AND STATUTES INVOLVED

This case involves the Fifth Amendment to the United States Constitution. It also involves the Act of August 1, 1888, as amended, 25 Stat. 357, 40 U.S.C. § 257, and the Act of November 6, 1966, 80 Stat. 1324 (the Washington Metropolitan Area Transit Authority Compact). These provisions are set forth in pertinent part in Appendix C, pp. 42a-43a, *infra.*

STATEMENT OF THE CASE

A. The Nature of the Controversy

This is an eminent domain proceeding instituted by the Attorney General of the United States on behalf of the Washington Metropolitan Area Transit Authority (hereinafter "WMATA") in the United States District Court for the District of Maryland for the fee simple interest in a parcel of land (designated as MA 317) in Bethesda, Maryland. Named as defendants—and petitioners here—are the parcel of land and Messrs. Marvin J. Goldman and Fred Burka, who as trustees of a pension trust and as general partners in a limited partnership, own the interests in the land in question and in improvements thereon. The public use for which the property was to be taken was the construction, maintenance and operation

of a rail rapid transit system and related facilities necessary or useful in rendering transit service, or in activities incidental thereto, as provided for in the Act of November 6, 1966, 80 Stat. 1324, which created WMATA.

The controversy between the parties turns on the scope of the taking which respondent may lawfully compel. WMATA's Complaint sought to condemn, and the courts below awarded a fee simple estate of the entire approximately 26,000 square feet of land in the parcel. Defendants pleaded in their Answer that WMATA is entitled only to condemn necessary easements in the land, to wit: (a) an approximately 700 square foot permanent surface easement for the purpose of constructing an elevator for handicapped persons; (b) an approximately 8700 square foot permanent subsurface easement for the purpose of constructing an escalator-way to serve the proposed station; and (c) a *temporary* construction easement for the entire site for the 32-month term of the proposed construction contract. Specifically defendants averred in their Answer and an accompanying Affidavit that the condemnation of the fee in the entire property was neither necessary nor useful to the subway system, that the foregoing easements were the most that WMATA's officials, in four years of discussions and negotiations, had stated were needed by WMATA for the construction of a subway station; and that the more sweeping condemnation was arbitrary and capricious and construction of a subway station, and that the more for the unlawful purposes of coercing the respondents to donate the easements to WMATA or to convey them for a wholly inadequate price and/or to enable WMATA to resell the fee at a profit.

B. The Factual Background [1]

The real estate which is the subject of this action is located in Bethesda, Montgomery County, Maryland. It consists of approximately 26,018 square feet of improved ground with frontage on the west side of Wisconsin Avenue approximately one-half block south of the intersection of Wisconsin Avenue, East-West Highway and Old Georgetown Road. The improvements located on the property consisted of a two-story commercial building which housed a motion picture theater and several commercial establishments. These improvements have now been demolished by WMATA.

Some time in 1973, WMATA informed defendants that it sought to acquire a partial interest, i.e., easements, in a small portion of the property in connection with its plans to construct access to a subway station to be located beneath Wisconsin Avenue in front of the property. In December 1973, WMATA and defendants held discussions at which both parties' intentions for use of the property were examined. Defendants informed WMATA that they planned to construct a new office building on the property. WMATA indicated it would require only a small partial interest in the property for location of an escalatorway and possibly for relocation of a chiller room and traction power station. (J.A. 23).

At a November 1974 meeting, WMATA staff members specified that they would need only easements, and not fee simple title as follows:

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[1] The facts recited herein are set forth in petitioner's Answer to WMATA's Complaint and in an accompanying affidavit and in exhibits to an accompanying motion to vacate the declaration of taking. These allegations were not controverted below, the district court having ruled in WMATA's favor as a matter of law. (See p. 39a *infra*.) Citations will be to the Joint Appendix below (J.A.).

(a) An approximately 700 square foot permanent surface *easement* for the purpose of constructing an elevator for handicapped persons;

(b) An approximately 8200 square foot permanent subsurface *easement* for the purpose of constructing an escalatorway to serve the proposed station; and

(c) A 26,018 square foot *temporary* construction *easement* for the entire site for the 32-month term of the proposed construction contract. (J.A. 23-24, 38).

In January and March 1975 Burka was again advised that WMATA sought to take only partial interests in the property. That fall, WMATA revised its plans to provide for the construction of a chiller room and traction power substation immediately above the proposed escalatorway. This revision necessitated a different type of permanent surface easement of 700 square feet for an air vent and a small increase in the permanent subsurface easement from 8200 square feet to 8700 square feet. The temporary construction easement of 26,018 square feet remained constant. (J.A. 24-25, 39).

At a meeting on January 7, 1976 between Burka and his attorneys and WMATA representatives, the WMATA negotiator stated again that WMATA intended to take only easements and to return the land so burdened to the owners so that the new office building planned by defendants could be built. Burka was also advised, for the first time, that, in the opinion of the WMATA negotiator, the "enhancement" in the value of the land because of the proximity of WMATA's proposed subway station would exceed the value of the partial interests to be acquired and that WMATA would expect to be paid for such "enhancement." (J.A. 39-40).

Although WMATA had never indicated or even intimated to defendants that it had any need or desire to acquire defendants' fee interests in the subject property, WMATA advised defendant Burka in March 1976 that the defendants had only two choices:

(a) donate the partial interests being sought by WMATA without any compensation or;

(b) have WMATA condemn the entire fee simple title. WMATA's negotiator stated "in no way will we (WMATA) agree to pay for the use of the property, the underground easement and for the destruction of the building." (J.A. 40).

In April of 1976, Burka was advised that WMATA's engineers had not completed their revised plan and that WMATA, therefore, had not ordered new appraisals of the interests it was seeking to acquire. However, WMATA negotiators continued to speak of acquisition of the above-described partial interests in the property, claiming the value thereof would be offset by the "enhancement" of the value of the remainder due to proximity to the proposed subway station. They advised Burka that WMATA had an internal *unpublished* policy to the effect that if damages for a partial taking exceeded 50% of the value of the fee, WMATA would condemn the entire fee and that if WMATA were unable to acquire the partial interests it needed by October or November of 1976 on WMATA's terms (i.e., donation), WMATA would proceed to condemn the entire fee. (J.A. 40-41).

Under a zoning ordinance adopted July 1, 1976, the Montgomery County Council created an entirely new zoning category for Montgomery County called CBD-3—the highest and best use given to a property owner, which allows the maximum utilization of the property. It was

applied to only a single square in the entire Bethesda area, the square in which the subject property is located.[2]

In November 1976 WMATA said that further negotiations concerning compensation had to be postponed because they had not received the revised engineering report; on January 31, 1977 WMATA further postponed negotiations because it had not received an appraisal report. (J.A. 41). Nevertheless, on January 3, 1977, without notice to defendants that it was doing so, and prior to receiving the appraisal report or providing the engineering report to defendants, WMATA applied to the Urban Mass Transportation Administration of the United States Department of Transportation for grant funds for the express purpose of acquiring a total fee simple estate in the aforesaid real property. (J.A. 27, 68). As of this time WMATA had never expressed to defendants, orally or in writing, that it needed for subway or other mass transit purposes more than the easements described in the fall 1975 revisions (p. 5 *supra*), let alone a fee simple interest in the entire estate. (J.A. 42).

By letter of March 16, 1977, WMATA suddenly presented to defendants a document styled "WMATA Statement of Just Compensation" and advised defendants that "a recent study of WMATA's requirements, and an appraisal of the rights required, has led to WMATA's decision to acquire the [subject property] in fee simple." (J.A. 70, 72). Thereafter, further meetings, discussions and correspondence between the parties for an agreement by WMATA to acquire lesser interests in the property consistent with WMATA's previously expressed needs and with the retention by defendant Trustees of

[2] This property is the only privately-owned real estate in this square which contains sufficient footage to utilize the optional CBD-3 zoning; the only other parcel containing a sufficient amount of land for this excellent zoning is already owned by WMATA. (J.A. 84-85).

their fee simple interest in the remainder were unsuccessful. (J.A. 26).

WMATA never showed to defendants or the courts below the "study" or "appraisal" to which it adverted in its March 16, 1977 letter; nor did it ever make any other showing why its "requirements" had thus expanded. WMATA's position throughout has been that it is entitled to "acquire" (in the sense of "claim by right and authority") a fee simple interest, and that neither the court nor defendants could inquire further once it was established (and petitioners have not disputed) that *some* interest in *some* portion of the property was necessary for subway construction.

C. Proceedings Below

WMATA filed a Complaint for Condemnation in the United States District Court for the District of Maryland on August 8, 1977. (J.A. 6-12). A Declaration of Taking was filed at the same time pursuant to 40 U.S.C. § 258a (J.A. 13-17) as well as a Motion for Order for Delivery of Possession requesting that plaintiff WMATA be given immediate possession of the property. On August 11, 1977, Judge Miller of that court signed an order granting WMATA immediate possession and granting defendants three weeks within which to vacate the property without payment of rent to WMATA, while reserving to defendants all rights to challenge the condemnation.

The defendants filed an Answer setting forth five affirmative defenses, which were summarized in the dis-

[3] In the course of this correspondence, WMATA by letter of May 25, 1977 rejected proposals which defendants had made and offered to purchase its "partial requirements in the subject property for a total consideration of $75,000.00". (J.A. 82). This was the first time WMATA offered any monetary consideration for the partial interests in the property which had been the subject of discussions since 1973. (J.A. 42).

trict court's opinion (pp. 5a-7a, *infra*). The court's description of the defenses which are presently germane are set forth in the margin.[4]

The Answer and an accompanying Affidavit of Defendant Fred Burka stated the facts we have described above. WMATA responded by a motion to strike the affirmative defenses and in the alternative for summary judgment (J.A. 97-98). WMATA's motion was not accompanied by any Affidavit, and did not controvert any

[4] 1. The complaint fails to state a claim upon which relief can be granted;

* * * *

[2.](b) Defendants deny that the property, and the quantum of the estate therein [fee simple], which is the subject matter of this action is sought to be acquired for a public use or purpose. Defendants further deny that WMATA has the right to acquire the entire fee estate;

3. (a) WMATA has exceeded and abused its statutory and legal authority and has engaged in a course of conduct so oppressive, coercive, and arbitrary and capricious as to constitute bad faith and a denial of defendants' Constitutional rights. Further WMATA is without power or authority to condemn the interest it seeks in this action.

* * * *

(d) The entire fee simple title to the property which is the subject of the instant action is not necessary or useful for the transit system;

(e) The determination by WMATA that the entire fee estate was necessary and useful for the transit system was arbitrary and capricious, without rational basis and made in bad faith;

(f) The acquisition of the entire fee estate would unlawfully discriminate against the defendants constituting a denial to them of the equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution;

4. The primary reason for WMATA seeking to acquire fee simple title is to enable WMATA, after completion of the proposed construction, to develop, lease and/or sell the property at a profit. WMATA is not seeking to acquire the property for a public use, but is seeking to engage in the real estate business, all in violation of defendants' rights under the Fifth and Fourteenth Amendments;

* * * *

of the factual allegations contained in defendant's Answer. The case went to issue before the court on plaintiff's motion to strike and defendants' response thereto, prior to any discovery by defendants. The District Court granted the motion to strike the defenses of a failure to state a claim and that the condemnation was unconstitutional and it granted the plaintiff summary judgment with respect to the defenses that (a) WMATA's condemnation of the instant property is not for a public purpose, and (b) WMATA's actions in seeking to acquire a fee simple title in defendants' land were arbitrary and capricious and constituted bad faith on the part of WMATA. The court also denied defendants' motion to vacate the taking. (p. 39a, *infra.*)

Thereafter, the parties stipulated that $1,058,600 was the just compensation to which petitioners were entitled for the taking fee simple in parcel MA 317 and reserving to the defendants the right to appeal the district court's order striking their defenses and the judgment of condemnation (J.A. 255-256). The district court entered judgment accordingly (J.A. 260).

On appeal, the Court of Appeals in a brief memorandum opinion affirmed the district court's judgment condemning the fee simple interest in parcel MA 317 (pp. 40a-41a, *infra.*)

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION CONCERNING THE AUTHORITY OF FEDERAL COURTS TO ADJUDICATE THE LEGALITY OF A TAKING IN EMINENT DOMAIN PROCEEDINGS.

This case presents an important and recurring question concerning the proper role of the federal courts in an eminent domain proceeding when the condemnee defends against the taking on the ground that it is not for a pub-

lic use, but is rather for an illegitimate purpose. The courts below have rejected as beyond judicial cognizance the condemnees' defenses that the taking of a fee simple interest in the property here was arbitrary, capricious and in bad faith in that the condemning agency's actions showed the property to be unneeded to accomplish the public use, and the real purpose of taking was to coerce the condemnees to donate the much smaller interest which was concededly needed, and/or to develop or reconvey the excess property for a profit for the condemning agency absent statutory authority therefor.

In so ruling they purported to follow this Court's decision in *Berman* v. *Parker*, 348 U.S. 26, and decisions of other lower federal courts which have read *Berman* as a holding that they must accept the condemning authority's assertion that a taking is necessary and that they may not inquire whether it is for a purpose which is contrary to law. This case presents a particularly appropriate occasion for defining the proper scope of judicial responsibility in eminent domain proceedings, because this case represents the farthest extension yet of *Berman* in that the court actually refused even to consider whether the taking of a fee was a bargaining tactic to avoid paying just compensation for easements, and thereby abused the process of the court.[5] The occasion is timely also because of the vast and growing magnitude of eminent domain proceedings in the federal courts.[6] And while

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[5] While we can make no representations regarding its frequency, this tactic is by no means unique. Indeed, one state condemning authority acknowledged it to be a customary device to obtain favorable settlements. (See p. 19 n.16, *infra.*)

[6] The Annual Report of the Attorney General of the United States for Fiscal Year 1978 stated at p. 165:

> In fiscal year 1978, new condemnation actions were filed to acquire 7,292 tracts of land. The appraised value of these tracts is $375,978,497.

[Footnote continued]

research has uncovered no statistics showing what proportion of these takings is not for the avowed public purpose, it is known that respondent WMATA alone has acquired $76.5 million in *excess* real estate.[7]

1. "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments." (*Madisonville Traction Co.* v. *St. Bernard Min. Co.*, 196 U.S. 239 at 251-252.) The question of what is a public use is, of course, for the court, even though the judicial role "is an extremely narrow one" (*Berman, supra*, 348 U.S. at 32; *see also, e.g. Cincinnati* v. *Vester*, 281 U.S. 434, 446.)

The taking of property in order to coerce the conveyance of a lesser interest or a smaller parcel for less than just compensation, is plainly not for a "public use" authorized by the Fifth Amendment; on the contrary, it is an assertion of governmental power to evade the requirements of the Fifth Amerdment. And of course, Congress did not authorize WMATA to condemn property for that purpose; indeed, such a course is at war with the Congressional policy that "in no event shall the head of a federal agency * * * take any * * * action coercive in nature, in order to compel an agreement on the price to

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There were 18,000 tracts pending at the start of the year. During the year, the Section closed 6,855 tracts. There were 18,347 tracts pending.

Referrals of new cases by acquiring agencies have increased dramatically since fiscal year 1973—from 3,026 tracts to 7,292 tracts in fiscal year 1978. It is anticipated that new tract referrals will average 6,000 annually over the next several years.

[7] See letter of July 11, 1979 from Secretary of Transportation Brock Adams to Rev. Jerry A. Moore, Jr., Chairman, WMATA, Appendix D, pp. 44a-46a, *infra*, at 45a.

be paid for the property."[8] Moreover, WMATA did not allege in its complaint, or assert on brief, that Congress has authorized it to condemn land excess to its needs in order to "develop, lease and/or sell [it] at profit," as also alleged here (see p. 6a, *infra*). Thus, if it were determined that this was the purpose of taking the fee the Court could not condemn it. (See *Cincinnati* v. *Vester*, *supra*, where because statutory authority was lacking, the Court reserved "[q]uestions relating to the constitutional validity of an excess condemnation" 281 U.S. at 449). Thus, if the fee was taken for either of these improper reasons, as alleged in the answer, and substantiated by the accompanying affidavit, the court could not lawfully condemn the fee.

2. *Berman* v. *Parker*, 348 U.S. 26, is not precedent for the judgment below. The principal issue in *Berman* was whether the redevelopment of a large area of Southwest Washington was a "public use." This Court held that it was, declaring "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." (*Id.* at 33). We fully agree. And we have not questioned Congress' power to approve and help finance a rail rapid transportation system and to authorize the condemnation of private property for that purpose. The appellant in *Berman* challenged also the condemnation of his particular property, which "did not imperil health or safety nor contribute to the making of a slum or a lighted area." (*Id.* at 34). But to this the Court responded that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis —lot by lot, building by building." (*Id.* at 35-36).

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[8] Section 301(7) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1904, 42 U.S.C. § 4651(7).

It was in this context that this Court enunciated the principle which was quoted below (see p. 28a, *infra*) and is set forth in the margin.[9] *Berman* thereby held that in determining the scope of the public use a decision that particular property should be included in a redevelopment project is a legislative decision. Thus, *Berman* would be in point if petitioners had asserted as a defense that there is no need to build a subway station on Wisconsin Avenue and East-West Highway where their property is located, or for the easements which WMATA's staff described, see p. 5, *supra*.

Berman vindicated in forceful terms the primacy of the legislature in defining the public uses and in specifying the means by which these public uses are to be accomplished. But that decision did not purport to announce revolutionary doctrine; it merely applied the modern teaching under the Fifth and Fourteenth Amendments that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." (348 U.S. at 32.) *Berman* did not decide that the court in which an eminent domain proceeding is brought may

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[9] It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States*, 147 U.S. 282, 298; *United States ex rel. T. V. A.* v. *Welch*, 327 U.S. 546, 554; *United States* v. *Carmack*, 329 U.S. 230, 247. [348 U.S. at 35-36].

Shoemaker v. *United States*, 147 U.S. 282, the other decision of this Court which was quoted by the district court (pp. 27a-28a, *infra*), goes no further. The Court there held first that erecting of a public park is a public use, and second, (in the passage quoted below) that the boundary of the public park was a legislative decision not open to judicial review. (*Id.* at 298.) The condemnees had argued that the taking was improper because erecting what is now Rock Creek Park was not for a public use and that the United States was seeking to condemn *less* land than had originally been proposed by the Commission established for the purpose. (See *id.* at 295.)

not consider the owner's defense that the taking is not for the public use asserted by the condemning authority, but rather some other purpose which was not authorized by the statute and forbidden by the Constitution. That is this case. When the courts consider such a defense they do not thwart the legislative will; they effectuate it by assuring that the condemning agency does not exceed the authority delegated to it. (See p. 12, *supra*). That is a duty which Congress expects the courts to perform.

3. When the present issue is considered unembarrassed by mistaken reliance on *Berman*, it is clear that the self-denying doctrine espoused below is fundamentally unsound. If the issue is characterized as being whether the condemning authority's decision to take the property in question is judicially reviewable it would be decisive that neither 40 U.S.C. § 257, nor any other statute prohibits consideration, in an eminent domain proceeding, of the defense that the taking is for an improper purpose. For,

> [i]n the absence of an expressed statutory prohibition the [condemning authority] bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of its decision. "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. See also *Rusk* v. *Cort*, 369 U.S. 367, 379-380 (1962); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). [*Dunlop* v. *Bachowski*, 421 U.S. 560, 567].

No such showing has been made.

But the case for judicial consideration of the purpose of the taking is even stronger. For this is not an instance

of a private party seeking judicial intervention against adverse administrative action. In an eminent domain proceeding it is the public authority, here WMATA, which invokes the jurisdiction of the court in order to obtain judicial relief, namely, an order condemning the property in question and directing its transfer to the public authority. Thus, it is appropriate to recall what the late Professor Hart wrote in a celebrated essay:

> Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury* v. *Madison*.[10]

Particularly since a taking which is not for a public use is unconstitutional (see pp. 12-13, *supra*) a statute which precluded the courts from considering the defenses raised herein "would, of course, raise serious questions [of] constitutionality" (see *Johnson* v. *Robison*, 415 U.S. 361, 366).[11] No such statute has been cited.

4. The courts' rejection as nonjusticiable, of petitioners' defense that WMATA condemned the fee simple in the entire property as a bargaining weapon in order to obtain the necessary easements without paying just compensation therefor, should be reviewed for an additional reason: It sanctioned an abuse of judicial process. An instructive analogy is provided by the cases in this Court which delimit the very broad statutory power of the Internal Revenue Service to summon persons to give testimony and produce records. The most recent of these is *United States* v. *La Salle National Bank*, 437 U.S. 298, where this Court explained:

> Prior to a recommendation for prosecution to the Department of Justice, the IRS must use its summons authority in good faith. *Donaldson* v. *United States*, 400 U.S., at 536; *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). In *Powell*, the Court announced several elements of a good-faith exercise.
>
> > "[The Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . . [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Ibid.* (footnote omitted). [437 U.S. at 313-314]

So, too, when a public authority brings an eminent domain proceeding in a United States district court it is "the court's process which is invoked" and of course the "court may not permit its process to be abused." To exercise the power of condemnation or to threaten its exercise in order to compel the owner to donate some of his property, or to relinquish it for less than its true worth, is indistinguishable from one of the precise forms of abuse which was described in *Powell*, *supra*,—"to put

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[10] Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362 (1953), reprinted in Hart and Wechsler's The Federal Courts and the Federal System (2nd ed., 1973) at 330, 341.

[11] The Court there cited (*id.* at n.8), Professor Hart's article and Mr. Justice Brandeis' concurring opinion in *St. Joseph's Stockyards Co.* v. *United States*, 298 U.S. 38, 84, where he wrote:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.

pressure on [the taxpayer] to settle a collateral dispute." Here, that dispute is the amount of just compensation to which the owners are entitled to receive for the property interest for which there *is* a public use.

Judicial consideration of this defense finds strong support in Mr. Justice Traynor's persuasive, albeit not controlling, opinion in *People* v. *Superior Court of Merced County*.[12] There, the State Department of Public Works condemned 54.65 acres of land of which only .65 acres were needed for the underlying public project, a freeway; the other 54 acres were "landlocked." The California Supreme Court held that it was lawful to condemn the 54 acres in order to avoid paying severance damages which would almost equal the cost of the entire parcel. But it held also, in terms immediately relevant here, that the trial court "must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements." [13]

Mr. Justice Traynor reasoned as follows:

> Under these circumstances excess condemnation is constitutional. "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of costs. [Citations.] And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public." (U.S. ex rel. Tennessee Valley Authority v. Welch, supra, 327 U.S. 546, 554. [Other citations omitted])

[12] 68 Cal. 2d 206, 65 Cal.Rptr. 342, 436 P.2d 342.

[13] 68 Cal. 2d at 208-209, 65 Cal.Rptr. 344, 436 P.2d at 344.

> We need not decide in what specific cases other than those mentioned the statute authorizes excess condemnation. It should be emphasized, however, that the economic benefit to the state must be clear. The economic benefit of avoiding the cost of litigating damages is not sufficient. The statute does not authorize excess condemnation anytime the condemnee claims severance or consequential damages. To allow such condemnation would nullify the constitutional guarantee of just compensation (Cal.Const., art. I, § 14) by permitting the state to threaten excess condemnation, not because it was economically sound, *but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking.*[14]

Thus, Justice Traynor, while giving generous scope to the power of eminent domain, took pains to guard against the abuse of this power by condemning authorities who would overreach owners of property. That the fear of such abuse is not chimerical was documented in the briefs in the *Merced County* case, as the dissenting opinion reveals.[15] We submit that the federal courts under the

[14] 68 Cal. 2d at 213-214, 65 Cal.Rptr., 436 P.2d at 346-347 (emphasis added). See also 68 Cal. 2d at 215-216, 65 Cal.Rptr. at 348, 436 P.2d at 348, where the Court distinguished between the justiciability of the questions of public use and necessity.

[15] Amici curiae have complained that the power of the Department of Public Works to condemn any excess property without limitation becomes a potent weapon to be used against prospective condemnees who refuse to sell at the price offered by the department. Right-of-way agents, it is indicated, demand acquiescence in sale of the desired part of the land at the proffered price with a threat of a punitive taking of all the owner's property. This could be disregarded as a fanciful fear were it not for the state agency's petition for writ of mandate, which candidly admits that denial of the right of excess condemnation "will also have important and substantial side effects upon the heretofore successful policy of petitioner in negotiating the settlement of land acquisitions." We cannot be

federal Constitution have no lesser obligation to protect the citizen against the excessive zeal of public officials.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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oblivious to the "tremendous power in government" and the need for "a growing sensitivity to the protection of the individual in his relation with government," as Justice Tobriner has written (Tobriner, Individual Rights in an Industrialized Society (1968) 54 A.B.A.J. 21, 22.) [68 Cal. 2d at 220-221, 65 Cal. Rptr. at 351, 435 F.2d at 351 (dissenting opinion.)]

Appendices

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-1306

WASHINGTON METROPOLITAN
AREA TRANSIT AUTHORITY

v.

ONE PARCEL OF LAND IN
MONTGOMERY COUNTY, MARYLAND,
MARVIN J. GOLDMAN, *et al.*,
AND UNKNOWN OWNERS,
(PARCEL MA317)

MEMORANDUM AND ORDER

Suit was instituted on August 8, 1977 by the Attorney General of the United States on behalf of the Washington Metropolitan Area Transit Authority (WMATA) for the condemnation of the fee simple interest in a parcel of land in Montgomery County, Maryland designated as Parcel MA317 and including lots numbered 22, 23, and the lot entitled "State Theatre" pursuant to Section 82, Act of November 6, 1966, 80 Stat. 1324 and Act of August 1, 1888, as amended, 25 Stat. 357, 40 U.S.C. § 257. The public use for which the property was to be taken was the construction, maintenance and operation of a rapid rail transit system and related facilities necessary or useful in rendering transit service, or in activities incidental thereto, as provided for in the Act of November 6, 1966, 80 Stat. 1324. A Declaration of Taking was filed at the same time pursuant to the Act of

February 26, 1931, 46 Stat. 1421, 40 U.S.C. §258a as well as a Motion for Order for Delivery of Possession requesting that plaintiff WMATA be given immediate possession of the property. On August 11, 1977, Judge Miller of this court signed an order granting WMATA immediate possession and granting defendants three weeks within which to vacate the property without payment of rent to WMATA, while reserving to defendants all rights to challenge the condemnation. Defendants Marvin J. Goldman and Fred Burka as Trustees of the Fremar Corporation Pension Trust and individually claiming an interest as owners in fee simple of the land contained in Parcel MA317 and as General Partners of the Baronet Properties Limited Partnership claiming an interest as owners in fee simple of the improvements located on Parcel MA317 and as lessees of the real property in Parcel MA317 filed an answer to the complaint for condemnation on August 24, 1977 setting forth various defenses to the taking which will be set forth more fully below. Additionally, these defendants filed a Motion to Vacate or, in the Alternative, to Stay the Declaration of Taking and Order for Delivery of Possession on the same date setting forth as reasons for the motion grounds similar to the defenses set forth in the answer. On September 6, 1978, plaintiff filed a Motion to Strike Defenses One through Five of Defendants' Answer or in the Alternative for Summary Judgment. As the issues involved in this motion were similar to those presented in defendants' motion to vacate, plaintiff's memorandum of points and authorities submitted with the motion addressed both its own motion and that of the defendants. Defendants responded to plaintiff's motion and offered further support of their own motion in a memorandum submitted on September 16, 1977. The matter of plaintiff's motion to strike or for summary judgment was argued before the court on September 23, 1977, with the court granting the

parties leave to file supplemental memoranda on both pending motions which were received by the court in the early part of November 1977. Although the court has not heard argument of counsel on defendants' motion to vacate the Declaration of Taking, the court is of the opinion that the issues in that motion sufficiently overlap those in plaintiff's motion to strike defenses to allow the court to decide both pending motions at this time without further argument from counsel. The court initially will consider plaintiff's motion to strike the defenses in the answer or in the alternative for summary judgment.

The instant motion to strike is brought pursuant to Rule 12(f) of the Federal Rules of Civil Procedure which provides that upon motion of a party or upon the court's own initiative, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court in *United States* v. *187.40 Acres of Land, Huntingdon Cty., Pa.*, 381 F.Supp. 54 (M.D.Pa. 1974), dealt with a Government motion to strike in a condemnation case and set certain guidelines to be followed in making the determination of whether defenses were insufficient:

> The duty of this Court is to determine whether such defenses as presented do indeed present substantial questions of law or fact which may not be stricken. If any such substantial questions exist, the motion cannot be granted; neither will it be granted if the insufficiency of the defense is not clearly apparent on the face of the pleadings, nor can reasonably be inferred from any state of facts in the pleadings. The purpose of such narrow standards is '. . . to provide a party the opportunity to prove his allegations if there is a possibility that his defense or defenses may succeed after a full hearing on the merits.' (citations omitted) 381 F.Supp. at 56.

These guidelines were accepted by the court in *United States* v. *416.18 Acres of Land*, 514 F.2d 627 (7th Cir. 1975) wherein the court went on the state that a Rule 12(f) motion:

> . . . [i]s nonetheless 'a useful and appropriate tool' for weighing the legal implications to be drawn from uncontroverted facts. In this regard, a Rule 12(f) motion 'admits only facts well pleaded, and mere conclusions of law, not warranted by the asserted facts have no efficacy.' (citations omitted) 514 F.2d at 631.

The law in the Fourth Circuit on a motion for summary judgment brought pursuant to Rule 56 of the Federal Rules of Civil Procedure is well-settled and the burden is upon the moving party to prove his grounds, while all matters presented in connection with the motion will be construed in the light most favorable to the opposing party:

> . . . [s]ummary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. *Phoenix Sav. & Loan, Inc.* v. *Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967).

While the grant of summary judgment is an important tool for the prompt disposition of cases:

> . . .[i]t should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. (citations omitted) *Stevens* v. *Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950).

In an attempt to place WMATA's motion to strike or for summary judgment in the proper perspective, the court will outline those defenses raised by defendants Goldman and Burka in their answer to the complaint for condemnation which the plaintiff now seeks to have stricken. Defendants present five defenses, two of which contain two or more grounds for defending against the taking, which can be summarized as follows:

1. The complaint fails to state a claim upon which relief can be granted;

2. (a) Defendants deny that the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. § 258a, is applicable to this action in that WMATA may not choose to proceed under this section when it initiates condemnation proceedings;

   (b) Defendants deny that the property, and the quantum of the estate therein [fee simple], which is the subject matter of this action is sought to be acquired for a public use or purpose. Defendants further deny that WMATA has the right to acquire the entire fee estate;

3. (a) WMATA has exceeded and abused its statutory and legal authority and has engaged in a course of conduct so oppressive, coercive, and arbitrary and capricious as to constitute bad faith and a denial of defendants' Constitutional rights. Further WMATA is without power or authority to condemn the interest it seeks in this action.

   (b) WMATA has failed to comply with the regulations issued by the Urban Mass Transportation Administration (UMTA) promulgated pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, as amended, 42 U.S.C. § 4601, *et seq.;*

(c) WMATA has failed to comply with its own regulations and procedures as set forth in "Washington Metropolitan Area Transit Authority, Policies and Procedures, Office of Real Estate", dated September 1, 1971;

(d) The entire fee simple title to the property which is the subject of the instant action is not necessary or useful for the transit system;

(e) The determination by WMATA that the entire fee estate was necessary and useful for the transit system was arbitrary and capricious, without rational basis and made in bad faith;

(f) The acquisition of the entire fee estate would unlawfully discriminate against the defendants constituting a denial to them of the equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution;

4. The primary reason for WMATA seeking to acquire fee simple title is to enable WMATA, after completion of the proposed construction, to develop, lease and/or sell the property at a profit. WMATA is not seeking to acquire the property for a public use, but is seeking to engage in the real estate business, all in violation of defendants' rights under the Fifth and Fourteenth Amendments;

5. Section 82(a) of the Washington Metropolitan Area Transit Authority Compact, Public Law 89-774, 80 Stat. 1324 (1966), Art. 41, § 317-82(a) Md. Ann. Code, repealed by Acts 1977, ch. 13, § 1, (July 1, 1977), recodified at Md. Ann. Code, Transportation, § 10-204 ¶ 82(a), (the Compact) and the UMTA and WMATA regulations have not been complied with in that WMATA has failed to negotiate in good faith and without

coercion, a condition precedent to the filing of a condemnation action.

In support of the third, fourth and fifth defenses, defendants have set forth a detailed description of the alleged facts surrounding their dealings with WMATA since 1973 with regard to the property at issue in this case. Additionally, defendants have submitted the affdavit of defendant Burka in support of these factual allegations. In order to clarify the factual bases for defendants' opposition to the taking as outlined in their answer, the court will present, in summary fashion, the alleged facts thus relied on by defendants. A chronological presentation of these facts appears to the court to be the best approach.

Allegations of Fact Contained in Defendants' Answer

In 1973 WMATA informed the defendants that it sought to acquire a partial interest in the subject property in connection with its plans to construct access to a subway station to be located underground and in front of defendants' property in Bethesda, Maryland. Discussions took place between defendants and WMATA during December 1973 with regard to this partial taking and in February of 1974 an agreement was reached between defendants and WMATA, the substance of which was that the defendants agreed to cooperate with WMATA in locating a power substation and chiller room on defendants' property in return for WMATA's efforts to coordinate the design of its project with defendants' architects and engineers who were studying a contemplated new structure on the land in order that defendants' proposed building could be incorporated in WMATA's own construction plans.

During 1974 and 1975 the defendants and WMATA held meetings for the purpose of coordinating their fu-

ture construction efforts during which time WMATA indicated that it would need only a certain permanent surface easement, a certain permanent subsurface easement and a certain temporary surface easement which would encompass the entire property, said temporary easement being for the purpose of maintaining a construction site while construction of the proposed subway station took place. In January of 1975, defendants were notified by WMATA of an upcoming appraisal of the value of these partial interests in the land. Further, in March 1975, defendants were notified that negotiations would commence in the near future on the consideration to be paid by WMATA for the partial interests in the land.

In the Fall of 1975, no agreement having been reached on the initially contemplated partial take, WMATA revised its plans without consultation with defendants or their architects and engineers. The revised plans indicated that WMATA would require different permanent surface and subsurface easements but that, in any event, the need still was for only a partial take of the property.

Following these revisions and during 1976, defendants and WMATA engaged in further discussions as to accommodating the revised plans of WMATA with defendants' own construction plans. In March 1976, during these discussions, WMATA demanded that defendants convey the partial interests in the property needed by WMATA without any payment of monetary compensation to the defendants.

On March 16, 1977, WMATA presented defendants with a "Statement of Just Compensation" stating that WMATA had decided to acquire a full fee simple title in the subject property. Although this statement had been presented by WMATA, between March 16, 1977 and May 9, 1977, WMATA continued to negotiate with the defendants as to the acquisition of a lesser interest

in the property. On May 9, 1977, defendants presented WMATA with a counteroffer as to the amount of consideration to be paid for a partial take of the property which was rejected by WMATA by a letter dated May 25, 1977 in which WMATA made an offer of its own as to the amount to be paid for the partial take. Prior to the May 25th letter, WMATA had sent a letter dated May 10, 1977 to defendants indicating that WMATA would proceed to condemn the entire fee simple. As the amount of compensation offered in WMATA's letter of May 25th was not satisfactory to the defendants, they continued to negotiate with WMATA for the partial taking of the property. Suit was instituted in August of 1977 seeking to condemn the entire fee having failed to reach an agreement on a partial take of the property.

I. *Failure to State a Claim*

WMATA contends that the complaint for condemnation does state a claim in that it meets all requirements of Rule 71A(c)(2) of the Federal Rules of Civil Procedure. Defendants, in their Memorandum in Opposition to Plaintiff's Resistance to Defendants' Motion to Vacate and in Opposition to Plaintiff's Motion to Strike and/or Summary Judgment, concede (at page 5) that the complaint satisfies the requirements as to form of Rule 71A(c)(2), but state that jurisdiction is not conceded.

The court in a Memorandum and Order issued on November 28, 1976, in *United States* v. *52.75 Acres, More or Less, Located in Prince George's County, Maryland*, Civil No. HM75-424, found that a complaint states a cause of action in condemnation if it meets the requirements of Rule 71A(c)(2) and conforms to Form 29, Appendix of Forms, Federal Rules of Civil Procedure:

> . . . [T]he complaint satisfies the requirements of Rule 71A(c)(2) of the Federal Rules of Civil Procedure which provides in part:

> The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interests therein. . . .

In addition, the Supreme Court has promulgated a form of complaint for the condemnation of property which is set forth as Form 29, Appendix of Forms, Federal Rules of Civil Procedure. The complaint conforms to the sample provided. Rule 84 states that '[t]he forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.' If the complaint is 'sufficient under the rules,' it must state a claim upon which relief can be granted. (At page 3 of the Memorandum and Order of Nov. 28, 1976).

The court has examined the complaint in the instant case to determine if it in fact conforms to the requirements of Rule 71A(c)(2) and Form 29 and finds that it does so comply. As the form is "sufficient under the rules" it states a claim upon which relief can be granted and plantiff's motion to strike the first defense will be granted.

As to defendants' challenge to the jurisdiction of this court, the court would merely note that jurisdiction is granted in § 81 of the Compact, Public Law 89-774, 80 Stat. 1324, 1350 (1966), Art. 41 § 317-81 Md.Ann.Code, repealed by Acts 1977, ch. 13, § 1, (July 1, 1977), recodified at Md.Ann.Code, Transportation, § 10-204 ¶ 81, which grants jurisdiction to this court for all actions brought by or against WMATA. Section 81 states:

> The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

II. *40 U.S.C. § 258a is Not Applicable to WMATA Condemnation Proceedings*

Before discussing defendants' argument as to this second defense, it is appropriate to set out in full Section 82(b) of the Compact which relates to condemnation proceedings undertaken by WMATA and the pertinent part of 40 U.S.C. § 258a, the Declaration of Taking Act. Section 82(b), as codified in Art. 41, § 317-82(b) Md. Ann. Code, repealed by Acts 1977, ch. 13, § 1 (July 1, 1977), recodified at Md. Ann. Code, Transportation, §10-204 ¶ 82(a), states:

> (b) Proceedings for the condemnation of property in the District of Columbia shall be initiated and maintained under the Act of December 23, 1963 (77 Stat. 577-581, D.C. Code 1961, Supp. IV, §§ 1351-1368). Proceedings for the condemnation of property located elsewhere within the zone shall be instituted and maintained, if applicable, pursuant to the provisions of the Act of August 1, 1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935 and 937, 28 U.S.C. § 1358 and 1403) or any other applicable act; provided, however, that if there is no applicable federal law, condemnation proceedings shall be in accordance with the provisions of the state law of the signatory in which the property is located gov-

erning condemnation by the highway agency of such state. Whenever the words 'real property,' 'realty,' 'land,' 'easement,' 'right-of-way,' or words of similar meaning are used in any applicable federal or state law relating to procedure, jurisdiction and venue, they shall be deemed, for the purposes of this title, to include any personal property authorized to be acquired hereunder.

That portion of Section 258a which is pertinent to the discussion to follow provides:

> In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .

Defendants' argument with regard to this defense is basically twofold: (1) Section 258a applies only to acquisitions of property by the United States. As WMATA is not an agency of the federal government but is rather an agency of the State of Maryland for purposes of condemning property located in Maryland, it cannot use Section 258a to effect a "quick take" of property condemned under 40 U.S.C. § 257. Accordingly, WMATA must make use of applicable Maryland statutes for the "quick take" of property. (2) Reference to the language of Section 82(b) reveals that it does not include Section 258a as one of the enumerated federal statutes under which WMATA may condemn property and only those federal statutes which are specifically enumerated in Section 82(b) are deemed to be "applicable acts" for condemnation purposes. Thus, Section 258a is not "any other applicable act" within the meaning of Section 82(b).

Plaintiff, in opposition to defendants' arguments, contends that when Section 82(b) is construed in conformity with the Congressional Consent Legislation, it is apparent that Section 258a is "any other applicable act" within the meaning of Section 82(b). Plaintiff further contends that WMATA is to be considered an agency of the United States for condemnation purposes and that Section 5(a) of the Act of November 6, 1966, 80 Stat. 1324, provided for the amendment of Sections 257 and 258a of Title 40 to include WMATA within the meaning of the phrase "or other officer of the government" in Section 257 and "United States" in Section 258a. Section 5(a) states:

> All laws or parts of laws of the United States and of the District of Columbia inconsistent with the provisions of Title III of this Act are hereby amended for the purposes of this Act to the extent necessary to eliminate such inconsistencies and to carry out the provisions of this Act and Title III and all laws or parts of laws and all reorganization plans of the United States are hereby amended and made applicable for the purpose of this Act to the extent necessary to carry out the provisions of this Act and Title III.

Initially, the court notes that Judge Watkins of this court found WMATA to be "an interstate agency, the result of an interstate compact between the State of Maryland, the Commonwealth of Virginia and the District of Columbia, entered into with the approval of Congress" in *C.T. Hellmuth & Associates, Inc.* v. *Washington Metropolitan Area Transit Authority*, Civil No. W74-1222 (Memorandum Opinion and Order, May 21,

1976). In finding this interstate agency status of WMATA, the court in *Hellmuth* noted:

> Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. (citations omitted) (At page 3 of the Memorandum Opinion and Order, May 21, 1976).

This court finds that WMATA is neither an agency of the State of Maryland or of the United States, but is an interstate agency that is governed by the terms of the Compact or contract entered into by the signatories and consented to by the United States Congress. Its powers to condemn property are to be governed by the terms of this contract and the Consent Legislation of Congress. Thus, if the court were to find that Section 82(b) of the Compact provides for the use of Section 258a to effect a "quick take" of the property being condemned pursuant to Section 257, then Section 5(a) of the Consent Legislation effectively amends Section 258a to include WMATA within the meaning of the "United States." From the foregoing, it is apparent that the only determination remaining to be made by this court is whether Section 258a is included within the language of Section 82(b) of the Compact allowing for condemnation of property under "any other applicable act."

In making this determination, the court first will consider defendants' argument based on the legislative history of the Compact as it was being considered by the United States Congress prior to Congressional consent under Article I, Section 10, Clause 3 of the United States Constitution. Defendants contend that the Reports

of both the Senate and House Judiciary Committees and portions of the Floor Debates in both Houses exhibit a direct intent on the part of Congress to limit Federal participation in the construction of the rapid rail transit system and to rely on local initiative and *local laws* to carry out the objectives of the Compact. The court has examined those portions of the Congressional legislative history provided by defendants and is in agreement with defendants that they indeed do reveal an intent on the part of Congress to maintain initiative for this project as much on the local level as possible. However, the court is in disagreement with defendants as to any intent expressed by Congress to use local laws to carry out the condemnation of property for the project under Section 82(b). Defendants have not made any reference to any portion of the legislative history which reveals an intent to rely on local law rather than federal condemnation law. Specifically, the exchange referred to by defendants between Congressman Poff and a Mr. Alper, counsel to the Joint Transportation Commission which drafted the Compact language, during House Judiciary Committee hearings on the Compact, supports little more than the proposition that if state law were to be used for the concondemnation of property because there was no applicable federal condemnation law for the proposed taking, then such state law would be deemed amended in order to allow WMATA to condemn personalty as well as realty. The court would note that Mr. Alper made a point of correcting Congressman Poff as to the manner in which Section 82(b) would operate as to WMATA's condemnation proceedings:

> I do not believe, Congressman, you quite stated the Act correctly. *We are required to proceed under the Federal or District of Columbia condemnation statutes. We can only proceed under the state statutes where there is no applicable Federal law.* 89th Cong., Hearings Before Subcommittee No. 3, Com-

mittee on the Judiciary, House of Representatives, July 20, 27 and August 3, 1966, at page 148.

If anything, the foregoing language indicates that a clear intent to rely on federal law was expressed in the Compact, with resort to state law only in the event that a federal law does not exist for the particular condemnation which is contemplated. The fact that the need was seen to amend state law to allow for the condemning of personalty does not, in and of itself, indicate that the parties to the Compact anticipated that all but general condemnations would be accomplished under state law. This is so because the parties also saw the need to have federal law amended to include WMATA within the terms of federal condemnation law to be applied, thus anticipating the utilization of federal laws and not strictly state laws.

In turning to the substance of the parties' arguments on whether Section 258a is to be deemed included within the "any other applicable act" language of Section 82(b) of the Compact, the court notes that neither party has been able to locate and cite to the court any case which directly deals with the question presented and the court, likewise, has been unable to locate any case decision which has dealt squarely with this issue. Thus, the court is of the opinion that it is appropriate in this case to examine directly the language of Section 82(b) to determine the intent of the parties to the Compact with regard to the law they chose in this contract to govern the condemnation of property by WMATA.

Section 82(b) first sets out the law that is to govern condemnation of property within the District of Columbia stating that the sections of the District of Columbia Code dealing with condemnation of property are to be used by WMATA. Section 82(b) then states that proceedings for the condemnation of property located in those portions of the State of Maryland and the Commonwealth of

Virginia which lie within the transit zone will be pursuant to 40 U.S.C. § 257 and 28 U.S.C. §§ 1358 and 1403 or "any other applicable act," also providing that in the event there is "no applicable federal law" then condemnation shall be in accordance with state law for the state wherein the property to be condemned is located. Section 257 is the general condemnation for public use statute while Sections 1358 and 1403 confer jurisdiction and venue upon the federal district courts. Thus, the parties to the Compact chose to specifically enumerate the general federal condemnation statute and the authority for jurisdiction and venue while seeking to encompass any other procedures WMATA may undertake in the condemning of property by use of the phrase "or any other applicable act." Only in the event that a federal statute did not exist for the specific procedure of condemnation which WMATA chose to follow would state law be available for proceeding. The Compact language of "any other applicable act" allows the inference that the Compact not only leaves room for but calls for the application of other federal condemnation acts and other federal proceedings ancillary to the condemnation such as Section 258a, which is merely a "quick take" provision that can be utilized only when there is a proceeding for condemnation taking place under another federal condemnation statute. The court is convinced that the language of the Compact evinces a clear intent on the part of the parties to this contract to have federal law govern WMATA's actions when seeking to condemn property under the contract. Additionally, the fact that state law is to govern only when there is no applicable federal law for the condemnation which is sought is further evidence of the choice of federal law by the parties to the Compact.

The court is aided in reaching this decision by the opinion of the Fourth Circuit Court of Appeals in *Washington Metropolitan Area Transit Authority* v. *Two Parcels of Land in Fairfax County, Virginia,* No. 76-1960

(Jan. 31, 1978). Although the issue to be decided in that case involved the propriety of certain "rebuttal" testimony offered as to valuation of land during a trial before a jury in the condemnation proceedings, the court also considered the landowners' contention that they were entitled to a trial before a commission as was provided for under the laws of Virginia, defendants claiming that said Virginia law was made applicable to the condemnation proceedings by virtue of Section 82(b) of the Compact. In finding that under the Compact federal procedural law was to apply, the court stated:

> In the WMATA Compact, Paragraph 82(b), which the parties agree governs procedure rather than jurisdiction, provides that proceedings for the condemnation of property outside of the District of Columbia shall be instituted and maintained pursuant to the provisions of 40 U.S.C. § 257 and 28 U.S.C. §§ 1358 and 1403 'or any other applicable Act.' It then provides that if there is 'no applicable federal law' the proceedings shall be in accordance with state law governing condemnations by the highway agency of the state. In Virginia, proceedings to condemn land for highway purposes are conducted by a commission.
>
> We find no hiatus in federal law requiring resort to the laws of Virginia. . . .
>
> Paragraph 82(b) of the Compact, as other portions of the Compact, evinces a preference for federal law, and state law is made applicable only when no federal law is applicable. *Id.* at 9-10.

In accord with this opinion, the court finds that the parties chose federal law to govern condemnation proceedings by WMATA and, as a consequence, they chose Section 258a to govern procedure when WMATA seeks immediate possession of property prior to the final condemnation judgment.

Putting aside for the moment the Compact's general preference for federal law, defendants would contend that as to the "quick take" of property, state law should apply because such is the case for land condemned in the District of Columbia.

Defendants argue that the Compact provides that when property is to be condemned in the District of Columbia, WMATA is to use the District of Columbia "quick take" statutes (16 D.C. Code § 1351-1368) which is comparable to making use of state statutes. Therefore, defendants contend, when WMATA seeks to gain immediate possession of property located within the transit zone in Maryland or Virginia, WMATA must make use of local state statutes for "quick take." This argument must fall because Section 258a, by its own terms, excludes the District of Columbia and if a condemnation proceeding is brought in the courts of the District of Columbia, WMATA may not make use of Section 258a's "quick take" provisions. Thus, as there is no applicable federal law for the "quick take" of property in the District of Columbia, WMATA must resort to the equivalent of state law and utilize the "quick take" provisions of the District of Columbia Code. The only time when state law is to govern condemnation procedure is when there is no applicable federal law. Therefore, whether or not Maryland has a "quick take" provision for condemnation proceedings is of no importance as there is, in fact, a federal law on the procedure. Since this federal law is Section 258a, WMATA correctly proceeded to gain immediate possession of the property at issue by following the procedures therein outlined.

The court has considered one additional argument which also leads to the conclusion that Section 258a is applicable to the condemnation proceedings in this case. The argument is that Section 258a is merely a declaration of immediate taking which is ancillary to and de-

pendent upon the bringing of an independent action for condemnation. Its purpose is twofold in that it seeks to expedite the public purpose for which the land is sought while providing that the government shall not be responsible for paying to the landowner interest on the amount of money estimated as the value of the taking which is placed in the court. *See Catlin* v. *United States*, 324 U.S. 229 (1944). In the instant case, the procedure under Section 258a is incidental to the taking of property under the authority of Section 257. As Section 82(b) specifically provides for the condemnation of property by WMATA pursuant to Section 257, any proceedings ancillary to this enumerated means of taking are also contemplated by Section 82(b). As this court has found that the language of the Compact evinces a clear intent on the part of the parties to have federal law govern condemnations by WMATA unless there is no applicable federal law, the court merely cites the above argument as additional support for the finding that Section 258a is a federal law coming within Section 82(b).

As the court has found that a Section 258a declaration of taking is "any other applicable act" within the meaning of Section 82(b) of the Compact, the court finds defendants' second defense to be, as a matter of law, insufficient and the court will grant plaintiff's motion to strike as to this defense.

III. *WMATA's Failure to Comply with the Regulations Issued by the UMTA and Promulgated Pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, as amended, 42 U.S.C. § 4601, et seq.*

Defendants contend that plaintiff's failure to comply with certain of the UMTA regulations is a defense to the taking of the property at issue in this case. Whether

in fact such a defense exists in a condemnation proceeding was decided by this court in *United States* v. *52.75 Acres, More or Less Located in Prince George's County, Maryland*, Civil No. HM75-424 (Memorandum Opinion, February 11, 1976) wherein the court held that the above-referenced Act "creates no rights and liabilities or defenses to a condemnation proceeding." In so finding, this court stated:

> 42 U.S.C. § 4651 delineates practices to be followed in acquisition of real property for federal programs. Section 4651 begins by providing that heads of federal agencies shall 'to the greatest extent practicable, be guided by the following policies. . . .' Section 4602(a) states:
>
> > The provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.
>
> The case of *Barnhart* v. *Brinegar*, 362 F.Supp. 464 (W.D. Mo. 1973), considered the question of whether the Act created rights in condemnees and concluded that it did not. The court examined the legislative history of the Act at great length, and that history need not be repeated here. The court stated:
>
> > From this history, we believe one conclusion is irresistable [sic]—Congress intended section 102(a) to preclude judicial review of federal and state agency actions under the real property acquisition practices of section 301 of the Act. (at 472)
>
> Several cases decided before *Barnhart* also concluded that the Act created no rights in condemnees. (citations omitted) (Memorandum Opinion at 3).

Accordingly, in the instant case the court will grant plantiff's motion to strike this defense as the court finds it to be insufficient as a matter of law.

IV. *WMATA's Condemnation of Defendants' Property is in Violation of the Fifth and Fourteenth Amendments of the Constitution of the United States*

Portions of defendants' third and fourth defenses as outlined in their answer allege that plaintiff is violating defendants' rights under the Fifth and Fourteenth Amendments of the Constitution. The facts offered in support of those contentions parallel those offered in support of defendants' defenses as to the taking not being for public purpose and as to the actions of WMATA constituting arbitrary and capricious conduct. In defendants' Memorandum in Opposition to Plaintiff's Resistance to Defendants' Motion to Vacate and in Opposition to Plaintiff's Motion to Strike and/or for Summary Judgment, defendants contend that the Fourteenth Amendment is applicable to the cause of action in this case because "by the terms of the Compact this is an action by an agency of the State of Maryland." As this court has previously found that WMATA is not an agency of the State of Maryland, defendants' argument as to the applicability of the Fourteenth Amendment must fall.

The Fifth Amendment Due Process clause has been held to provide to the condemnee only the right to just compensation for the taking following appropriate inquiry to determine what is "just" compensation for the particular property involved. The Supreme Court in *Berman* v. *Parker*, 348 U.S. 26 (1954) stated:

> The rights of these property owners are satisfied when they receive that just compensation which the

> Fifth Amendment exacts as the price of the taking. 348 U.S. at 36.

Again, in *U.S. Ex Rel. T.V.A.* v. *Road Easement, In Coffee Cty., Tenn.*, 424 F.Supp. 567 (E.D. Tenn. 1976), the court ruled upon a contention that bad faith had been exhibited by the condemning authority in its failure to provide an administrative hearing prior to condemnation which violated the condemnee's right of due process of law under the Fifth Amendment:

> A hearing on the taking of private property for an intended public use is not essential to due process under the Constitution, Fifth Amendment, Due Process Clause. *Cf. Bragg* v. *Weaver* (1919), 251 U.S. 57, 58-59, 40 S.Ct. 62, 64 L.Ed. 135, 137 (headnote 1), (with reference to a taking by a state agency under the Constitution, Fourteenth Amendment, Due Process Clause). The landowners will have due process by the determination of how much they are to be compensated for the taking of their particular property and rights therein. *United States* v. *Carmack* (1946), 329 U.S. 230, 247, 67 S.Ct. 252, 91 L.Ed. 209, 220, cited in *Trager* v. *Peabody Redevelopment Authority*, D.C. Mass. (1973), 367 F.Supp. 1000, 1002-1003[5]; *Berman* v. *Parker* (1954), 348 U.S. 26, 35-36, 76 S.Ct. 98, 99 L.Ed. 27, 39 (headnote 14). 424 F.Supp. at 569.

This court is in agreement with plaintiff that in the instant case, defendants' due process rights under the Constitution's Fifth Amendment will be secured by the judicial proceedings to be conducted in this case pursuant to Rule 71A of the Federal Rules of Civil Procedure. However, this does not completely resolve the question of defendants' rights under the Fifth Amendment. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for *public use*

without just compensation." (emphasis supplied) Thus, defendants' allegations that the property in question was not taken for a public use shall remain to be considered. As this inquiry falls squarely within the remainder of the defenses to be discussed by the court, the court will defer consideration of this issue until a later portion of this opinion. Suffice it to say at this point that any defenses which defendants may claim based on denial of due process under the Fifth Amendment are insufficient and will be stricken by the court.

V. *WMATA's Condemnation of the Instant Property is Not for a Public Purpose*

The complaint in this action states that the public purpose for which the property is to be condemned "is the construction, maintenance and operation of a rapid rail transit system and related facilities necessary or useful in rendering transit service, or in activities incidental thereto, all as provided in the Act of November 6, 1966, 80 Stat. 1324." The legislative authority for the taking includes Section 82 of the Compact which was negotiated among the District of Columbia, the State of Maryland and the Commonwealth of Virginia and the United States Congress with Congress consenting to the Compact, all as previously mentioned in this opinion. As the court has discussed the authority granted to WMATA to condemn property under Section 82(b) of the Compact, the court would merely note that it has been determined that said condemning authority resides in WMATA. The public purpose of the joint endeavor among the jurisdictions and the federal government under the Compact and thus the public purpose for any condemnations effected under the Compact was stated by Congress at 80 Stat. 1324:

> Whereas Congress heretofore has declared in the National Capital Transportation Act of 1960 (Public Law 86-669, 74 Stat. 537) and in the National Capital Transportation Act of 1965 (Public Law 89-173, 79 Stat. 663) that a coordinated system of rail rapid transit, bus transportation service, and highways is essential in the National Capital Region for the satisfactory movement of people and goods, the alleviation of present and future traffic congestion, the economic welfare and vitality of all parts of the Region, the effective performance of the functions of the United States Government located within the Region, the orderly growth and development of the Region, the comfort and convenience of the residents and visitors to the Region, and the preservation of the beauty and dignity of the Nation's Capital and that such a system should be developed cooperatively by the Federal, State and local governments of the National Capital Region, . . .

Defendants have conceded that the construction of a rapid rail transit system is a public purpose but maintain that their land is not being taken in furtherance of this purpose. Although not conceding so directly, it appears to the court that all parties are agreed that at least a portion of the interest in land is required for the construction efforts of WMATA. This is evidenced by the fact that defendants engaged in a course of negotiations with WMATA over a period of several years for acquisition by WMATA of a partial interest in the subject land. Additionally, the court is of the opinion that the acquisition of this land bears at least some rational relationship to the overall purpose of WMATA in constructing the rapid rail transit system. The acquisition also can be said to bear a relationship to the construction of the subway station which is contemplated in Bethesda, Maryland as it appears that access to this station will be located on the subject property as well as certain structures needed for the operation and maintenance of this particular subway station.

Defendants contend that although a legitimate public purpose exists for the project as a whole, this fact does not negate their ability to challenge the taking on the grounds of arbitrary and capricious and bad faith conduct on the part of WMATA in acquiring this particular parcel of land. The court in *United States* v. *58.16 Acres of Land, Clinton County*, 478 F.2d 1055 (7th Cir. 1973), has stated that:

> The determination of whether the taking of private property is for a public use may approximately and materially be aided by exploring the good faith and rationality of the governmental body in exercising its power of eminent domain. 478 F.2d at 1958.

Thus, allegations of bad faith conduct or arbitrary and capricious action on the part of the condemning authority are actually challenges to the public use for which the land is allegedly condemned. And a challenge to the public use criteria is always allowable as the Fifth Amendment requires that any condemnation be for a legitimate public use. *See also Ledford* v. *Corps of Engineers of United States*, 500 F.2d 26 (6th Cir. 1974). The court turns now to defendants' contentions that plaintiff's action in condemning the land which is the subject of this suit was arbitrary and capricious and in bad faith.

VI. *WMATA's Actions in Seeking to Acquire a Fee Simple Title in the Land Were Arbitrary and Capricious and Constituted Bad Faith on the Part of WMATA*

The defendants have asserted throughout various of their defenses that WMATA's conduct with regard to condemning defendants' property was oppressive, arbritrary and capricious, coercive and constituted bad faith on the part of WMATA. These allegations comprise the remainder of the defenses presented in the answer which the court has not yet addressed and include the defendants' claims (1) that the negotiations for the acquisition of the property were not conducted in good faith; (2) that WMATA has failed to comply with its own regulations and procedures for condemning property, which also indicates bad faith on the part of plaintiff; (3) that the decision to take the entire fee simple interest in the property was arbitrary and capricious as the entire fee was not needed to fulfill WMATA's stated purposes; and (4) that the real purpose behind the taking of the entire fee rather than a partial interest in the land was to acquire the land for future development, resale or lease at a profit upon completion of the subway-related construction. A close scrutiny of these contentions reveals that each is premised on the assertion that WMATA does not need the entire fee, which fact it is claimed is evidenced by the course of negotiations between WMATA and the defendants and the alleged fact that WMATA made the decision to take the entire fee only upon a failure to acquire the partial interests it sought from defendants without any monetary compensation or for an amount which was not satisfactory to the defendants. As all of defendants' remaining contentions rely on the assertion that WMATA's purpose, and thus the public purpose, will be fulfilled by certain permanent and temporary easements in the land, rather than an entire take of the land, the court's discussion will center on whether the court may in this case examine the necessity of the fee taking by WMATA.

The extent to which a court may examine the taking in a condemnation case is well established in the law. The general rule assigning a narrow role to the courts was delineated in *Shoemaker* v. *United States*, 147 U.S. 282 (1893), where the Supreme Court stated:

> The adjudicated cases likewise establish the proposition that, while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a

> public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made. 147 U.S. at 298.

In *Berman* v. *Parker*, 348 U.S. 26 (1954), the Supreme Court again examined the scope of judicial review in condemnation cases, and stated:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. (citations omitted) 348 U.S. at 35-36.

Using these two decisions of the Supreme Court as the basis for a determination of those matters which may be scrutinized by the courts in a condemnation proceeding which has been challenged, it has become well-settled in the law that a court generally may not inquire into the necessity of the taking at issue. As the court noted in *United States* v. *187.40 Acres of Land, Huntingdon Cty., Pa.*, 381 F.Supp. 54 (M.D. Pa. 1974):

> The judicial role in review of condemnation cases does not encompass the power of determining whether the land taken is actually necessary for the successful operation of the project, *United States* v. *2,606.84 Acres, supra,* [432 F.2d 1286 (5th Cir. 1970)] but only extends to deciding the propriety of the public purpose of such acquisitions and the requisite statutory authority, *e.g. United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 66 S.Ct. 715, 90 L.Ed. 843 (1945); *Berman* v. *Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). Moreover, the taking of more land than necessary is no defense to condemnation acquisition. *Wilson* v. *United States*, 350 F.2d 901 (10th Cir. 1965); *United States* v. *Bowman, supra,* [367 F.2d 768 (7th Cir. 1970)]; and, indeed, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C.A. § 258a does not require proof of necessity of the land taken, *Wilson* v. *United States, supra,* but instead allows the decision as to the need for such land to lie solely within the opinion of the federal official involved. 381 F.Supp. at 57.

Earlier, in the case of *United States* v. *2,606.84 Acres of Land in Tarrant Co., Tex.*, 432 F.2d 1286 (5th Cir. 1970), *cert. denied* 402 U.S. 916, *reh. denied* 403 U.S. 912, the court summarized the status of the law on the question of the extent to which the court may examine into the necessity of the particular take:

> The argument that land sought to be condemned is not really necessary for the consummation of a plan is frequently made in condemnation cases in an attempt to defeat the taking. This argument, however, has been unanimously rejected by every court which has considered the matter. It is perfectly clear that the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the operation of the project. 432 F.2d at 1289.

The Fourth Circuit Court of Appeals reached the same conclusion in *United States* v. *21.54 Acres of Land, Marshall Cty., W. Va.*, 491 F.2d 301, 304-305 (1973) where it was stated that "the discretionary determination by the condemning authority of the extent of the take is not reviewable by the court."

One exception to this general rule of nonreviewability of the necessity of the taking which has developed in the case law is that allowing for judicial scrutiny of a taking involving arbitrary, capricious or bad faith conduct. This exception was noted by the Fourth Circuit Court of Appeals in *United States* v. *91.69 Acres of Land, Etc.*, 334 F.2d 229 (1964), wherein the court noted that the "well-established rule" of the *Shoemaker* case, *supra*, should generally be followed:

> . . . [a]lthough it is at least theoretically conceivable that a case of arbitrary, capricious or corrupt conduct might arise which would call for judicial intervention. 334 F.2d at 232.

Various other courts of appeals have found that inquiry into the taking is permissible where the decision to condemn property is allegedly arbitrary, capricious or made in bad faith based on the Supreme Court's decision in *United States* v. *Carmack*, 329 U.S. 230 (1946). *See Southern Pacific Land Company* v. *United States*, 367 F.2d 161 (9th Cir. 1966); *Simmonds* v. *United States*, 199 F.2d 305 (9th Cir. 1952); *United States* v. *64.88 Acres of Land*, 244 F.2d 534 (3rd Cir. 1957); *United States* v. *Certain Real Estate*, 217 F.2d 920 (6th Cir. 1954); *United States* v. *Certain Parcels of Land*, 215 F.2d 140 (3rd Cir. 1954); *United States* v. *Meyers*, 113 F.2d 387 (7th Cir. 1940); *Wilson* v. *United States*, 350 F.2d 901 (10th Cir. 1965); and *United States* v. *State of New York*, 160 F.2d 479 (2nd Cir. 1947). The Court in *Carmack*, *supra*, by implication, stated that courts may "set aside" condemnation determinations "if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned." (footnote omitted) 329 U.S. at 243.

This court has recognized the defense to a condemnation proceeding of the arbitrary and capricious actions

or the condemning officials in *United States* v. *52.75 Acres, More or Less, Located in Prince George's County, Md.*, *supra* (at page 4 of the Memorandum Opinion issued on February 11, 1976) wherein this court held that answers to certain interrogatories served on the plaintiff would be compelled as they were relevant to an arbitrariness defense. A full discussion of this defense in light of the facts cited by defendants was presented in the Memorandum Order of this court issued in the above case on November 28, 1976 where the court found that the facts presented by defendant as to the arbitrary nature of the actions taken by the condemning authority were insufficient to warrant a grant of summary judgment to the defendants.

Proceeding on the assumption that a defense of arbitrary and capricious conduct on the part of the condemning officials will lie in a condemnation action, defendants in this case have sought to rely on the case of *United States* v. *58.16 Acres of Land, Clinton County*, *supra*, stating that the factual situation in the instant case is controlled by the *Clinton County* case. The court in Clinton County found that where there had been detailed allegations of bad faith of the nature there presented, the district court could not dispose of the landowner's claims without a hearing. Specifically, the landowner denied that the land was taken for a public purpose, basing this denial on charges against the Corps of Engineers that it was condemning his land solely to avoid the need to compensate him for the damages to the land by erosion caused by the Corps' maintenance of high reservoir water levels which in turn caused the wave action which had washed away his land. The landowner further claimed that he was the only landowner against whom condemnation proceedings were commenced and as there were intervening tracts of land between his and the Carlyle Reservoir Dam, the acquisition of his

land alone could not further the stated purpose of the dam project. 478 F.2d at 1056-1057. This court is of the opinion that the *Clinton County* case is readily distinguishable from the instant case. In *Clinton County*, the landowner directly challenged the public purpose of the taking of his land. It was not a question of whether the Corps of Engineers needed the entire fee or only a partial take of the land to fulfill the stated purpose as is the case in the instant condemnation. The landowner's contention was that no matter what amount of land was taken, it would not serve a public purpose. In the instant case, it is apparent that WMATA does in fact need some portion of defendants' land and the question presented is whether WMATA made an arbitrary decision to take the entire fee simple.

The court is further of the opinion that the instant case more properly is controlled by the decisions in *Ledford* v. *Corps of Engineers of United States, supra,* and *United States* v. *2,606.84 Acres of Land in Tarrant Co., Tex., supra. Ledford* involved an appeal from the district court's granting of the condemning authority's motion to dismiss the landowner's action and the court's denial of the landowner's motion for a preliminary injunction. The Sixth Circuit Court of Appeals held that the decision of the Corps of Engineers to condemn an entire tract of land rather than two acres of this tract was not subject to judicial review. In so holding, the court stated:

> Appellant relies primarily upon *United States* v. *58.16 Acres of Land, etc.*, 478 F.2d 1055 (7th Cir. 1973) [the *Cliton County* case], where Chief Judge Swygert recognized that there is a narrow exception to the general rule of judicial non-reviewability of an administrative decision to condemn a particular tract of property. However, that decision holds that a court may consider only a contention

> that property is not being taken for a public use. Once a court decides that the taking of property is for a public use, then the judicial function is exhausted, and the extent, amount, or title of property to be taken lies within administrative determination, subject only to the requirement that just compensation be paid. . . .
>
> The complaint in this appeal concedes the public purpose of the Marins Fork Dam and Reservoir Project, but complains '[t]hat Engineers have taken and intended to take much larger areas of land than reported to the Congress and the public, contrary to regulations promulgated by the Secretary of the Army . . .' and that '[t]he District Engineer arbitrarily and capriciously intends to take all of Tract 115 [containing plaintiff's land], knowing full well that his own subordinates have recommended that only two acres of the land be condemned, that being all that is needed for the Dam and the highway construction.'
>
> Appellant's contentions are just the kinds that *Berman* v. *Parker, supra,* holds are to be decided by the condemning agency, not subject to review by the courts. 500 F.2d at 28.

Like the *Ledford* case, defendants in this case have conceded that the rapid rail transit system is a public purpose and defendants have contended that the taking is arbitrary and capricious because WMATA knows and has repeatedly indicated that all it needs for its construction purposes is a partial take of the land. Additionally, defendants have contended that the decision to take the entire fee was arbitrary and capricious because it was made in violation of WMATA's own regulations and procedures. Just as the *Ledford* case did not fall within the reasoning of the *Clinton County* case, this court finds

that the instant action does not come within the *Clinton County* case. This court also finds that the defenses of defendants to this action are of the same nature and type as those raised in the *Ledford* case and which were dismissed as falling within the prohibitions of judicial review of *Berman* v. *Parker, supra.*

The Fifth Circuit Court of Appeals in *Tarrant County, supra,* was faced with an appeal by the government from a judgment in the district court setting aside a declaration of taking. The court held that where the district court was forced to find that the land taken was *not necessary* for the stated purpose in order to find that the stated purpose for the taking was not the real purpose, this involved a forbidden inquiry on the part of the court into the necessity of the taking. The Corps of Engineers had condemned the landowner's entire parcel of land. The question presented involved whether the taking by the Corps of Engineers of the part of the parcel of land which was located above a certain elevation was for the stated purpose of the construction and operation of a dam project. The landowner contended that the Corps of Engineers did not have to take the entire parcel in order to fulfill this purpose, stating that the land above the certain elevation was not necessary to the project and that, in fact, the Corps of Engineers was taking this additional portion of land for recreational purposes which were not authorized. The district court found that the disputed land was being taken for recreational purposes but in order to make this determination, the court had to find that the land was not necessary for the purpose as stated in the complaint for condemnation. Thus, although the Corps of Engineers had stated that the land was being taken for purposes of the dam project, the court found that it was not necessary for this purpose and it was being taken for an unauthorized purpose.

The court of appeals reversed the district court's determination basing the reversal on the rule of law of the nonreviewability of the necessity of the taking as outlined in *Berman* v. *Parker, supra,* and related cases, stating:

> The district court attempted to take the present case out of this rule of non-justiciability by characterizing the question as one of purpose rather than necessity. Instead of finding outright that the land was not needed for the stated purpose, the court concluded that the purpose stated by the Secretary of the Army in the declaration of taking was not the real purpose for the taking and that the real purpose [sic], recreation, was unauthorized. We do not think this slight change in terminology is sufficient to convert what is essentially a legislative determination into a judicial question. *United States* v. *Mischke,* 8th Cir. 1961, 285 F.2d 628. In fact, the change in terminology does not disturb the court's basic finding of non-necessity. In order to find that the stated purpose was not the real purpose the court was forced to find that the land was not necessary to achieve that stated purpose. It is clear that this is an inquiry forbidden to the court. *Berman* v. *Parker, supra; West, Inc.* v. *United States, supra.* 432 F.2d at 1290.

In the instant case, defendants would have this court determine the WMATA's stated purpose for the taking of their land, the construction and operation of a rapid rail transit system, is not in fact the real purpose for the taking, but that the real purpose is to acquire land which WMATA can eventually sell or lease at a profit once construction is completed on defendants' land, a purpose which is not authorized by either the Compact or the Consent Legislation of Congress. However, it is abundantly clear that in order for this court to make

that determination, it would be necessary, likewise, for this court to determine that in fact WMATA does not need the entire take of the land to accomplish its stated purpose and that a mere partial take of the land would suffice. This is not a justiciable question and the court is precluded from any such inquiry.

The court in *Tarrant County* did note that one exception to this general rule exists, said exception being the ability of the landowner to challenge the purpose for which the land is taken based on the arbitrary and capricious conduct of the condemning officials. However, the court further noted that the arbitrary and capricious conduct must be of such a nature that it renders the association between the land condemned and the purpose of the project null and void:

> The only exception to this rule would occur if the delegated official so overstepped his authority that no *reasonable man could conclude that the land sought to be condemned had some association with the authorized project.* In such a case alone could the taking be considered arbitrary or capricious as those terms are used in condemnation proceedings. There must be basic to the project pervasive deception, unreasoned decision, or will-of-the-wisp determination before these words of perjoration are brought into play.

In the present case there is no evidence from which the court could conclude that the land above elevation 697.1 was *so dissociated* with the Benbrook Dam *as to render the taking arbitrary or capricious in this necessary sense.* . . . There is an administrative assertion by the Secretary of the Army that the land is necessary to the construction and operation of the project. That assertion is not so patently untenable that a reasonable person could not find an

> association between the project and the land. Once this determination is made the judicial function is ended and the declaration of taking must be sustained. (emphasis supplied) 432 F.2d at 1290-1291.

Thus, the court generally is not permitted to examine into the necessity of a particular taking to fulfill the stated purpose of the condemning authority, and the one exception to this general rule allows the court to examine only as to whether the disputed land [or interest in land] bears some association to the authorized project. Only when such an association cannot be found, will the actions of the condemning authority be considered arbitrary and capricious, because only then will the decision to take the particular land be unreasoned or deceptive.

In the instant case, the court previously has noted that the parcel of land at issue in this case can be said to have some association with the project. Specifically, all parties are agreed that at least a portion of the land is required for [not merely associated with] the construction and operation of the subway system in this location. Additionally, the court has stated that the take of this particular parcel of land can be said to have a rational relationship to the rapid rail transit system because of its location and the plans of WMATA to locate a subway station access area on the land as well as certain other structures in aid of the operation of the subway station to be located in close proximity to this land. Thus, it is apparent that defendants could show no set of facts which would result in this court finding that this particular parcel cannot be said to bear some association to the authorized project. The facts which defendants have presented, in very detailed fashion, go only to whether the entire fee simple interest in this parcel of land is needed for the purpose of this project. Absent the court's finding that the parcel of land bears no as-

sociation to the project, the court is precluded from examining these facts as to the need for a partial take versus a total take. The decision as to the amount of the take is solely within the discretion of the condemning authority and this court will not substitute either its own judgment or that of the landowners for the judgmental decision of WMATA.

As the court has considered the affidavit of defendant Burka in connection with its determination as to the defenses of the answer which allege arbitrary and capricious conduct on the part of the plaintiff, and as the court has determined that under these or any other facts which defendants could present, the court may not scrutinize WMATA's decision to take the entire fee simple interest in Parcel MA317 because the court has found that Parcel MA317 has some association to the authorized project of constructing and operating a rapid rail transit system, the court will grant plaintiff's motion for summary judgment as to all defenses which are based on the arbitrary and capricious or bad faith conduct of the plaintiff. *See Scott Lumber Company* v. *United States*, 390 F.2d 388 (9th Cir. 1968).

As to defendants' Motion to Vacate or, in the Alternative, to Stay the Declaration of Taking and Order for Delivery of Possession, all grounds presented in support of this motion have been considered and ruled upon by the court in connection with plaintiff's motion to strike or for summary judgment. As the court has found that certain defenses should be struck as insufficient as a matter of law and as the court has granted plaintiff's motion for summary judgment as to the remainder of the defenses, there remain no meritorious grounds on which defendants' motion to vacate could be granted. Accordingly, the court will deny defendants' motion.

In accordance with the foregoing opinion, it is this 7th day of April, 1978, by the United States District Court for the District of Maryland,

ORDERED:

(1) that plaintiff WMATA's Motion to Strike Defenses be, and the same hereby is, *Granted* as to the following defenses:

(a) failure to state a claim,

(b) 40 U.S.C. § 258a is not applicable to WMATA condemnation proceedings,

(c) WMATA's failure to comply with the regulations issued by the UMTA and promulgated pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, and

(d) WMATA's condemnation of defendants' property is in violation of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment;

(2) that plaintiff's Motion for Summary Judgment be, and the same hereby is, *Granted* as to the following defenses:

(a) WMATA's condemnation of the instant property is not for a public purpose, and

(b) WMATA's actions in seeking to acquire a fee simple title in defendants' land were arbitrary and capricious and constituted bad faith on the part of WMATA;

(3) that defendants' Motion to Vacate or, in the Alternative, to Stay the Declaration of Taking and Order for Delivery of Possession be, and the same hereby is, *Denied.*

/s/ Herbert F. Murray
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1587

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, a body corporate,
Appellee,

vs.

MARVIN J. GOLDMAN and FRED BURKA, Individually and as Trustees of the FREMAR CORPORATION PENSION TRUST and as General Partners of the BARONET PROPERTIES LIMITED PARTNERSHIP,
Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Herbert F. Murray, District Judge.

Argued June 4, 1979 Decided June 29, 1979

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and RUSSELL, Circuit Judge.

Harold Gordon (William H. Roberge, Jr. (Gordon & Healy on brief) for Appellants; Nancy B. Firestone, Department of Justice (James W. Moorman, Assistant Attorney General, Gary Petersen and Robert L. Klarquist, Department of Justice on brief) for Appellee.

PER CURIAM:

On appeal, the property owners challenge the Transit Authority's exercise of its eminent domain power in condemning a fee simple interest in their land rather than easements. After a careful review of the record, the briefs and the arguments, we agree with the district judge that the condemnation proceedings were proper in form and authorized by law. Accordingly we affirm the dismissal of the complaint.

AFFIRMED.

APPENDIX C

CONSTITUTION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

---

40 U.S.C. § 257 provides as follows:

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The Washington Metropolitan Area Transit Authority Compact provides in pertinent part as follows:

Section 2: The purpose of this Title is to create a regional instrumentality, as a common agency of each signatory party, empowered, in the manner hereinafter set forth, (1) to plan, develop, finance and cause to be operated improved transit facilities, in coordination with transportation and general development planning for the Zone, as part of a balanced regional system of transportation, utilizing to their best advantage the various modes

of transportation, (2) to coordinate the operation of the public and privately owned or controlled transit facilities, to the fullest extent practicable, into a unified regional transit system without unnecessary duplicating service, and (3) to serve such other regional purposes and to perform such other regional functions as the signatories may authorize by appropriate legislation.

* * * *

Section 82: (a) The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property, or any interest therein, necessary or useful for the transit system authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, or by a private transit company.

"(b) Proceedings for the condemnation of property in the District of Columbia shall be instituted and maintained under the Act of December 23, 1963 (77 Stat. 577-581, D.C.Code 1961, Supp. IV, Sections 1351-1368). Proceedings for the condemnation of property located elsewhere within the Zone shall be instituted and maintained, if applicable, pursuant to the provisions of the Act of August 1, 1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935 and 937, 28 U.S.C. 1358 and 1403) or any other applicable Act; provided, however, that if there is no applicable Federal law, condemnation proceedings shall be in accordance with the provisions of the State law of the signatory in which the property is located governing condemnation by the highway agency of such state. Whenever the words 'real property,' 'realty,' 'land,' 'easement,' 'right-of-way,' or words of similar meaning are used in any applicable federal or state law relating to procedure, jurisdiction and venue, they shall be deemed, for the purposes of this Title, to include any personal property authorized to be acquired hereunder.

APPENDIX D

THE SECRETARY OF TRANSPORTATION

Washington, D. C. 20590

[EMBLEM]

July 11, 1979

Reverend Jerry A. Moore, Jr.
Chairman
Washington Metropolitan Area
Transit Authority
600 5th Street, N.W.
Washington, D.C. 20001

Dear Reverend Moore:

I appreciated receiving your letter of July 5, 1979, accompanied by a proposed construction and funding plan for completion of the Metro system. Your proposal includes a schedule for Interstate transfer commitments over the next four and half years and assumes congressional authorization of funds beyond the Interstate Highway sources sufficient to fully fund 101 miles of construction.

We have reviewed your submission and found it to be responsive to our May 31 request that, in scheduling the use of available Interstate transfer funds, you accelerate construction in the District of Columbia and open each new system segment for revenue operation as early as possible.

We are prepared to use your schedule as the basis for approval of the Interstate transfer grants programmed for FY 1979, as well as for the remainder of the Interstate transfer funds. He will proceed on this basis with the understanding that:

1. You will be able to recoup for your construction program by FY 1983 $76.5 million in federal funds from the resale of excess real estate that was acquired by WMATA with direct 2/3 federal appropriations (to be set off against the transition grant in that amount now under review by UMTA);

2. The Authority will vigorously pursue cost reduction efforts in all aspects of its design and construction program, including the redesign of vaulted arch stations, as reflected in your earlier financial plan submissions, and review of the use of a shallower station at Fort Totten; and

3. Execution by the Authority and the Department of a mutually acceptable Initial Bond Repayment Participation Agreement must precede grant approvals. In this regard we will forward a revised proposed agreement in the very near future.

You have accomplished much in reaching this local agreement on an orderly sequence of construction for Metro that provides the earliest possible dates for the operation of each system segment. We recognize that a new congressional authorization will be necessary to fund completion of the system beyond the Interstate transfer amounts.

We have noted that your estimates of the cost to complete the system are based on an assumed annual inflation rate of 6 percent for the period FY 1981 to 1986. In light of recent experience and the Comptroller General's report on Metro issues dated April 10, 1979, we believe a higher escalation rate should be used.

We are aware of the tremendous demand being placed on the Metro system during the current energy shortage and of the growing role Metro will play in changing our community's dependence for mobility on the automobile. We agree with you that this can best be accomplished by com-

pleting the full 101 mile Metro system in operable segments at the earliest possible date.

We are prepared to meet with you to answer any further questions you may have and look forward to final resolution of the outstanding issues in time for approval of the FY 1979 grant requests needed to move this program forward.

Sincerely,

/s/ Brock Adams
BROCK ADAMS

Supreme Court, U.S.
FILED
JAN 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-748

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN J. GOLDMAN AND FRED BURKA, ETC., PETITIONER

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
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JAMES W. MOORMAN
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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 41a) is reported at 599 F. 2d 1050. The opinion of the court of appeals (Pet. App. 40a-41a) is not reported. The opinion of the district court (Pet. App. 1a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. By orders of September 11 and October 24, 1979, the Chief Justice extended the time for filing the petition to November 10, 1979, and the petition was filed on November 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court was required to consider whether a less than fee simple interest in petitioners' land would have sufficed to achieve respondent's public purpose.

STATEMENT

In 1973, respondent Washington Metropolitan Area Transit Authority (WMATA) informed petitioners of its intention to acquire an interest in property that petitioners owned in Bethesda, Maryland, for construction of a subway station. In 1975, WMATA informed petitioners that it needed a 699 sq. ft. permanent surface easement, an 8,722 sq. ft. permanent subsurface easement, and a 25,318 sq. ft. construction easement (J.A. 68-69).[1] WMATA also informed petitioners that no compensation would be paid for the partial taking because the value of the remainder after the construction of the subway would exceed the current value of the entire tract.

On March 16, 1977, WMATA presented petitioners with a "Statement of Just Compensation," stating that WMATA had decided to acquire fee title to the entire property and offering petitioners $858,600 as just compensation (J.A. 73). Petitioners responded with a counter-offer of $409.000 for acquisition of the partial easements and the construction easement (J.A. 74-81). When negotiations between the parties failed to produce agreement, WMATA initiated this condemnation action in the United States District Court for the District of Maryland to condemn a fee simple title to the entire parcel. Petitioners answered that WMATA had exceeded its statutory authority and had acted arbitrarily, capriciously, and in bad faith by seeking to acquire full fee title (J.A. 18-25, 45-46).

Following a bench trial, the district court granted WMATA's motion to strike and for summary judgment and denied petitioners' motion to vacate or, in the

[1] "J.A." refers to the joint appendix in the court of appeals.

alternative, to stay the declaration of taking (Pet. App. 39a). The court held that, because at least a portion of the property was admittedly required for the construction and operation of the subway system, the taking was for a public purpose, and that WMATA's decision to take a full fee estate was not arbitrary, capricious, or in bad faith (Pet. App. 28a-38a). Thereafter, the court entered judgment fixing just compensation at $1,058.600, as the parties had stipulated (J.A. 260). The court of appeals affirmed per curiam (Pet. App. 40a-41a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any court of appeals, and petitioners present no issue warranting review by this Court.

Petitioners' contention before this Court is that WMATA sought a fee simple interest in the land, not because it needed such an interest to carry out its concededly public purpose, but because it wanted a "bargaining weapon in order to obtain the necessary easements without paying just compensation therefor * * *" (Pet. 16-17). In petitioners' view, this alleged tactic was "arbitrary, capricious and in bad faith * * *" (Pet. 11). Contrary to petitioners' contention (Pet. 11), however, the district court did not refuse to consider this defense; it explicitly ruled that "allegations of bad faith conduct or arbitrary and capricious action on the part of the condemning authority are * * * always allowable * * *" (Pet. App. 26a), and it considered petitioners' allegations in detail (Pet. App. 26a-38a). What the district court did hold was that, because construction of the subway station was concededly in furtherance of a public purpose (Pet. App. 33a), and because WMATA did in fact need some portion of petitioners' land to carry out that purpose (Pet. App. 32a), the court could not enter judgment for petitioners unless it "determine[d]

that in fact WMATA does not need the entire take of the land to accomplish its stated purpose and that a mere partial take of the land would suffice" (Pet. App. 36a). The court concluded that "[t]his is not a justiciable question and the court is precluded from any such inquiry" (*ibid.*).

The district court's conclusion was compelled by *Berman* v. *Parker*, 348 U.S. 26 (1954), in which the Court held that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch" (*id.* at 35-36). The question in *Berman* was whether a particular tract of land could properly be condemned as part of a sweeping urban renewal project; the question here is whether petitioners' entire parcel can be condemned in the face of petitioners' allegations that a lesser portion, or a lesser interest, would suffice. In both cases the answer is the same: "[i]f the [a]gency considers it necessary in carrying out the * * * project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that * * * title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation." *Berman* v. *Parker*, *supra*, 348 U.S. at 36.

Petitioners attempt to distinguish *Berman* v. *Parker* by casting their dispute with WMATA as one involving the question whether "the taking is not for the public use asserted by the condemning authority, but rather some other purpose which was not authorized by the statute and [is] forbidden by the Constitution" (Pet. 15). But since petitioners agree that the construction of a subway system, and the condemnation of land for that purpose,

is a legitimate exercise of congressional power (Pet. 13), and since they also agree that their land could appropriately have been chosen for a subway station (Pet. 14), it is apparent that their claim of "some other purpose" is simply a claim that WMATA has sought a fee simple interest when some lesser interest, such as various easements, would have sufficed. As the district court properly concluded, this claim invites the court to rule that the public agency must be restricted, in condemning land for a valid public purpose, to limits the court deems appropriate. This is the inquiry that *Berman* v. *Parker* prohibits. Once the court determines, as it did here, that the land is being taken for a public use, "the judicial function is exhausted, and the extent, amount, or title of property to be taken lies within administrative determination, subject only to the requirement that just compensation be paid." *Ledford* v. *Corps of Engineers of United States*, 500 F. 2d 26, 28 (6th Cir. 1974). See *Berman* v. *Parker*, *supra*, 348 U.S. at 36.

Petitioners' contention (Pet. 12-15) that further review in this case is justified because they have challenged WMATA's economic motives in taking a fee estate is without merit. Courts have consistently refused to "second guess" the government's asserted purpose for condemnation. *United States* v. *80.5 Acres, of Lands, Etc., Co. of Shasta, Cal.*, 448 F. 2d 980, 984 (9th Cir. 1971). In addition, the validity of a taking is not defeated because the decision to condemn an entire tract is based in part on economic factors. WMATA admittedly needs all of the property for at least two years while subway construction is taking place, and admittedly needs at least some permanent easements for operating the subway after the station is completed (Pet. 11; J.A. 139). That WMATA considered relative costs in deciding to

condemn the entire fee does not invalidate the taking.[2] *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554 (1946); *United States* v. *6,321 Acres, of Land, Etc., Suffolk Co.*, 479 F. 2d 404, 407 (1st Cir. 1973); *United States* v. *Agee*, 322 F. 2d 139, 142-143 (6th Cir. 1963); *Southern Pacific Land Co.* v. *United States*, 367 F. 2d 161, 163 (9th Cir. 1966), cert. denied, 386 U.S. 1030 (1967); *United States* v. *State of South Dakota*, 212 F. 2d 14, 15 (8th Cir. 1954); see generally 2A *Nichols on Eminent Domain* §7.223[2] (3d ed. 1976). As this Court explained in *United States ex rel T.V.A.* v. *Welch*, *supra*, 327 U.S. at 554:

> The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost.

Finally, WMATA did not abuse the process of the court in seeking to condemn in fee (Pet. 17-18). Prior to initiation of this action, WMATA negotiated with petitioners for acquisition of the partial interests or in the alternative for the entire fee. In fact, discussions on acquisition of the property continued for more than three months after WMATA announced its decision to condemn in fee. After these talks broke down, WMATA exercised its condemnation authority, and petitioners were awarded the full market value of their property.

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[2]There are also reasons beyond initial cost for WMATA's decision to condemn a fee. First, by controlling the fee, WMATA is assured that development of the parcel is made consistent with WMATA's interests. For example, by controlling the air rights, WMATA can control the timing of the development, thereby eliminating the possibility of liability in the event delays in construction of the subway occur. Further, by owning in fee, WMATA is protected from further financial liability in the event more property is needed. Occasionally, when underground easements are involved, the acquiring agency must later condemn the surface estate because the established surface uses come in conflict with the subsurface use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
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JANUARY 1980

Supreme Court, U.S.
FILED
FEB 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-748

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v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, A BODY CORPORATE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

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1. WMATA, represented by the Solicitor General, does not deny that the question presented by the Petition is "important and recurring." (Pet. 10-12.) Its opposition to review is based exclusively on the contention that "the decision below is correct" (Br. Opp. 3). In so contending it perpetuates the lower courts' misunderstanding of *Berman* v. *Parker*, 348 U.S. 26, which is at the heart of the problem and which only this Court can correct.

According to respondent, the claim that an interest in land is being condemned for an improper purpose

> invites the court to rule that the public agency must be restricted, in condemning land for a valid public purpose, to limits the court deems appropriate. This is the inquiry that *Berman* v. *Parker* prohibits. (Br. Opp. 5)

On the contrary, the claim invites the court to rule only that the public agency is condemning land (or any interest therein) for a purpose within limits which *the Constitution* deems appropriate, namely, a "public use" within the meaning of the Fifth Amendment. *That* is an inquiry that the Constitution commands (see Pet. 12-13, 15-16; *cf. Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 163). And it is one which, far from prohibiting, *Berman* v. *Parker actually undertook;* what the Court said on this subject was that

> [t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one. (348 U.S. at 32).

We fully agree that judicial review should be "extremely narrow," see Pet. 14-15; but this differs fundamentally from a holding that the issue of "public purpose" is nonjusticiable.

Berman also did not state, let alone decide, that the issue ceases to be justiciable whenever some portion of the taking is admittedly for a public purpose. For it has never been the law—although it is the precise result of the ruling below—that because the Government has a public purpose for taking part of a person's property, that person's Fifth Amendment right not to have his property taken except for a public use is forfeited with respect to some other part of his property or interest therein.

Nor did *Berman* decide that property may be taken to give the public agency the opportunity to resell it for a

profit, that property may be condemned in order to fulfill a threat which was made in order to coerce the property owner to donate some lesser inteerst, or that a property owner's allegation that the taking was for either of these purposes does not raise a justiciable issue. All that *Berman* held to be nonjusticiable was the proper scope of a project which had been determined to be a public use, and, given the scope of the project as so defined, the need of the public agency for the specific property in question. (See 348 U.S. at 36, quoted at Br. Opp. 4.) Since WMATA did not identify any purpose relating to the construction or operation of a transit system that would be served by taking the entire fee, neither that portion of *Berman* nor the Ninth Circuit decision cited at Br. Op. 5 [1] supports the decision below in this case.[2]

2. Respondent's assertion that "the validity of a taking is not defeated because the decision to condemn an entire tract is based in part on economic factors" (Br. Opp. 5) is carefully ambiguous. It states the law accurately if "economic factors" is understood to refer to the costs of the project. This includes so structuring the taking that the amount of just compensation due is reduced; that was the holding of *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (Br. Opp. 6), which was

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[1] *United States* v. *80.5 Acres of Land, etc.* 448 F.2d 980, 984 (C.A. 9).

[2] Moreover, *Berman* did not involve, and the Court did not decide, the question whether the condemnation court may consider that the taking is not for the purpose asserted by the agency *where the condemnee asserts that the actual purpose of the taking was one forbidden by the Constitution,* as is alleged here. Yet the highly restrictive view of the judicial function adopted below would *a fortiori* require acceptance of the agency's *ipse dixit,* thereby nullifying the condemnee's constitutional defense that the taking was for an invalid purpose. It of course does not follow from such a holding that sham or unsubstantiated allegations by condemnees would prevail; compare, for example, the experience under the abuse-of-process doctrine of *United States* v. *Powell,* 379 U.S. 48, discussed at Pet. 17-18.

followed in *People* v. *Superior Court of Merced County* (cited and quoted at Pet. 18-19), but does not reach this case. On the other hand, if "economic factors" is read more broadly, so as to be germane to petitioners' actual contention—that WMATA (which holds $76.5 million worth of excess property, see Pet. 12, 45a) has taken the entire fee for development or resale at a profit—respondent's proposition finds no support in *TVA* or any other authority. Indeed, the distinction between reduction of cost and attempting to turn a profit is drawn in *Superior Court of Merced County* (see Pet. 19), and in the leading treatise on eminent domain:

> In view of the fact that property may not be taken for the public use and then turned over to private enterprise for non-public purposes, when property is taken for the public use, there cannot at the same time be taken additional adjacent property which it is not intended to devote to the public use, but which is to be sold for profit as soon as the improvement is completed.[3]

The subsection of that treatise which is cited at Br. Opp. 6 actually states that "there is no constitutional requirement that the taking be limited in extent to the present public necessities," and further that "[i]f a taking of the fee is made for a public use, *in good faith and without a wholly unnecessary excess*, it is no ground for opposing the taking that the parties making it intend to derive a private revenue by leasing the land not required for *immediate* occupation."[4] This case, then, is one which the treatise carefully excepts from the category of constitutionally authorized takings; that is, it is one where the taking of the fee was *not* in good faith, and *does* encompass a "wholly unnecessary excess."

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[3] 2A Nichols on Eminent Domain, § 7.223, 3d ed., 1976 (footnote omitted).

[4] *Id.*, § 7.223[2], emphasis added.

3. In order to press this case into the mold of constitutionally permissible takings as set forth in the cited treatise, appellate counsel offer the imaginative but extra-record suggestion that WMATA may have a future need for a fee simple. This is a classic "post-hoc rationalization" (*cf. Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168), having never been advanced by WMATA in three years of negotiations or in support of WMATA's motion to strike the condemnees' defenses and for summary judgment. Both WMATA's presently asserted reasons for taking the entire fee, and the *ipse dixit* that "WMATA did not abuse the process of the Court in seeking to condemn in fee" (Br. Opp. 6), constitute factual allegations which controvert petitioners' substantiated defenses—that the taking was not for any valid purpose but rather to enable WMATA to develop or reconvey the excess proprety for a profit and/or to coerce the donation of the lesser interest which was actually needed. WMATA's felt need to becloud consideration of the Petition by injecting these factual issues into the case betrays a lack of confidence in the legal ground on which petitioners' defenses were rejected below.

4. The constitutional values at stake are readily stated: The Fifth Amendment grants a property owner two rights against the sovereign when it seeks to take his property: (1) he has the right to resist the taking and retain his property unless the taking is for a public use, and (2) the property may not be taken even for a public use except on payment of just compensation. If the decision below stands, the way will be clear for public agencies to coerce the surrender of one or the other of these Fifth Amendment rights, where there is a public need for a part, but only a part, of the owner's property.

Owners who wish to avoid condemnation of the whole will be able to do so only by donating the needed part (or conveying it for whatever the agency offers.) If

they insist on litigating the amount due for the part as just compensation, the agency will condemn the whole. The court will then approve the taking, treating as nonjusticiable the owner's defense that part of the taking is not for public use. (See Pet. 19-20).

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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